

No. 5494

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE SAI YING, alias LEE HUNG CHONG,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

*Upon Appeal from the United States District Court
for the Territory of Hawaii.*

APPELLANT'S BRIEF

LESLIE P. SCOTT and
WILMER H. EBERLY,
Attorneys for Appellant.

Filed this.....day of....., A. D. 1928.

By..... Deputy Clerk.

FILED

HONOLULU STAR-BULLETIN, LTD.

SEP 26 1928

PAUL P. O'BRIEN,
CLERK

No. 5494

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

LEE SAI YING, alias LEE HUNG CHONG,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

*Upon Appeal from the United States District Court
for the Territory of Hawaii.*

APPELLANT'S BRIEF

STATEMENT OF THE FACTS

This case is similar to the *Ching Hong Yuk Case* decided by this Court and reported in 23 (2nd) Fed. 174.

Defendant was arrested under the Chinese Exclusion Act, charged with having gained his admission into the United States by false and fraudulent claim of American citizenship. The case was tried before the District Judge, District of Hawaii in the first instance and resulted in an order of deportation. The judge, as in the *Ching Hong Yuk Case*, made no findings of fact on the essential elements involved in the charge. Defendant appealed.

The defendant left Hawaii when he was three years old

with his parents on the S. S. City of Peking, sailing from Honolulu October 9th, 1897. (Record p. 53.) He returned on November 27, 1922, and after a hearing before a Board of Special Inquiry, he was admitted as an Hawaiian-born citizen of the United States, and a Certificate of Identity (Record p. 32) issued to him.

Without anything being disclosed as the reason, six years later, on or about May 17th, 1927, he was arrested by Immigration Inspector Erbs, and taken to the Immigration Station where he was confined and questioned along the line of his examination before the Board in 1922. (Record pp. 22 and 34.)

Another Chinese named Lee Dan who had been a witness for the defendant on his original hearing, was also taken to the station and examined but although available the Government did not call him as a witness. (Record pp. 29 and 31.)

Defendant introduced in evidence his Certificate of Identity. (Record p. 22.) He was also called as a *witness for the government*, and testified at some length under examination by both court and counsel as to his Hawaiian birth, family history, etc. (Record p. 11.) His landing record was introduced in evidence and also the record of his examination in 1928. (Record p. 24.) The Government also called a clerk from the Territorial Archives to read into the record the fact that on the outgoing manifest of the S. S. City of Peking, sailing October, 1897, the name of "Lee Long, wife and child," appeared. (Record p. 26.) We will refer to that at more length in the argument.

ERRORS RELIED ON

The Assignment of Errors are numbered 1 to 8, but we believe the error assigned as No. 6 sufficiently describes the issue presented here:

“That the United States District Court erred in holding and finding that the defendant had not sustained the required burden of proof to establish his lawful right to be and remain in the United States.”

ARGUMENT.

If there is anything to distinguish this case from the *Ching Hong Yuk Case*, a conscientious study of the record has failed to reveal it. Exactly what was said in the brief in that case is applicable here.

The burden of proof, which Section 3 of the Exclusion Act places on the defendant, was sustained by the introduction (1) of his 1922 landing record (2) his certificate of identity (3) his unforeseen examination following his unlawful imprisonment in 1927, and (4) his testimony on the witness stand. In all these examinations there is not a material discrepancy. It is true that he is quoted in 1922 as saying his mother's feet were not bound while in 1927 he said they were bound, but this was due no doubt to faulty interpretation or stenographic error. An examination of the record shows how that question was asked—one of a routine group, the answers to which were bunched together. (Record p. 56.) Errors of that sort frequently happen.

The fact is, that after six years the defendant was able to submit to a grilling examination without forewarning or opportunity for preparation and was taken over the same ground as in 1922 and emerged without a discrepancy, except the one noted above and attributable to faulty interpretation or stenographic error. And he was also, on the witness stand, able to withstand the questioning of court and counsel for the government without deviating in the slightest from his original testimony. Comment cannot

add to the impression these significant facts must make on the mind of any candid person.

In the matter of the manifest of the outward bound S. S. City of Peking, mentioned above, a witness was called and adduced the fact that the manifest indicated the departure of Lee Long, his wife and child (Record p. 26) on that voyage, which corroborated defendant's testimony that he departed with his parents on that trip of the steamer. (Record p. 57.) His father's name was Lee Long. (Record p. 56.)

Thereafter Mr. Erbs took the stand and testified as follows:

Q. Mr. Erbs, have you examined the records of your office for records of Chinese, Chinese who returned to this port claiming they departed on the record of Lee Long alias Lee Ping Tong?

A. Yes. The records of the Immigration Service of Honolulu show that four boys came back claiming to be Lee Long's boy, who departed on October 9th, 1897 with his wife and child on the City of Peking.

Q. Four have come back claiming to be that boy?

A. Four. Four different records.

(Record pp. 27-28.)

Aside from the fact that this evidence was incompetent, and not the best evidence, the records themselves being available, the testimony leaves this defendant unconcerned.

He is not answerable for the fraud if three or four youths tried to palm themselves off as his mother's son. Whether they succeeded in their unlawful efforts, Mr. Erbs is careful not to say. It is fair to assume that the vigilant officers of the immigration service detected the spurious character of their claims and sent them back to the land of their father's. Any other assumption would not be flattering to the service Mr. Erbs is attached to.

The significant thing in this connection was the indisposition of the Assistant U. S. Attorney to introduce the records and let them speak for themselves. He had them with him in court. (Record p. 28.)

Of course it is patent that having alleged defendant gained admission into this country by false and fraudulent claim of citizenship, the charge is not sustained by hinting that some one else did.

Although available, it is noteworthy that the government did not call Lee Dan, an original witness for defendant whom Mr. Erbs questioned at the Immigration Station. A statement had been taken from him concerning defendant under circumstances which also made it impossible for him to have access to his original testimony; and if he had been an unworthy witness giving false testimony, it is incredible that after the lapse of six years he could be taken over the same questions without that fact becoming apparent. We can't assume that the government failed to call him out of consideration for the defendant. On the contrary, the government declined to call him because it was well aware that his testimony accorded in all particulars with defendant's.

The only findings of fact made by the judge, read as follows: (Record p. 77-78.)

That said Lee Sai Ying alias Lee Hung Chong, is a Chinese person and a person of Chinese descent and was born in China and is a subject of the Chinese government; that he is a Chinese laborer; that he was found within the limits of the United States, to wit, in the City and County of Honolulu, Territory of Hawaii, on or about the 18th day of May, 1927, without a Certificate of Residence required by the Act of Congress entitled "An Act to Prohibit the Coming of Chinese Persons to the United States," approved May 5,

1892, as amended November 3, 1893; and that the said Lee Sai Ying, alias Lee Hung Chong, did not establish by affirmative proof to the satisfaction of this Court his lawful right to remain in the United States.

Considering the evidence before the court, these findings could hardly be expected. The court found defendant was "*born in China and is a subject of the Chinese Government.*" There is not a scintilla of evidence that he was born in China or that he owes allegiance to the government of that country. On the contrary, all the evidence without contradiction is that defendant was born in Hawaii and hence is a citizen of this country. The second item of the findings, that he was found here without a Certificate of Residence, is sheer nonsense, and only illustrates again what was illustrated in the *Ching Hong Yuk Case*: the unwillingness of the Court to concede any probative value to Certificates of Identity. Findings of fact which the charge naturally suggests were not made.

The Government charged fraud but offered no evidence tending to support the charge. On the contrary its evidence negated the possibility of fraud. The defendant, called as a witness for the government [*we submit, the government is bound by his testimony*] testified to his Hawaiian birth, which is uncontradicted. The only other witness except for formal matters of no consequence here, was Inspector Erbs and certainly by no stretch of the imagination can any fraud imputable to defendant be gleaned from his testimony. The only part where even the subject of fraud may be inferred is quoted above, and that relates to three or four Chinese boys who tried, unsuccessfully we assume, to masquerade as his mother's children.

In view of the record and the failure of the judge to make essential findings, it seems hardly necessary to quote

authorities. We recognize that the burden is on a Chinese person under the Exclusion Act to establish his right to remain, but we submit the defendant more than met the burden in this case.

Ng Fung Ho vs. White, 266 Fed. 765

Ex Parte Wong Yee Looy, (D. C.) 227 Fed. 247

Wong Yee Toon v. Stump, 233 Fed. 195, 196, 147
(4th Circuit) C. C. A. 200

U. S. v. How Lim, (D. C.) 214 Fed. 456, at 463.

Certificates of Identity are issued under authority of Rule 20, Subdivision 8, of the Bureau of Immigration's Regulations relating to Chinese. It reads:

"When (a certificate of identity) is issued to a person of Chinese descent, as a United States Citizen by birth or descent, *the certificate will be accepted thereafter as evidence of the holder's right to reside in the United States.*"

This is a departmental regulation made pursuant to law and having the force and effect of law.

The Government takes the position that the court should ignore the importance of the fact that defendant when arrested unexpectedly in 1927 was immediately grilled by an Inspector under circumstances which precluded possibility of access to his original testimony and yet, when taken over the same questions as in 1922, touching his family history, recent and remote, place of birth, residence in China and many minor matters, his answers accorded with his 1922 testimony in every particular, with the single exception of the character of his mother's feet. We submit that this discrepancy is fully explainable on the basis of error of interpretation or mistaken transcription. Note how the question was asked, and the answer:

Q. Are your parents living?

A. Yes; father Lee Long, alias Lee Ping Pong, age 61, and mother Wong Shee, 51, natural feet. (Record p. 56.)

Defendant and the interpreter must have engaged in a colloquy before the answer was given.

The authorities amply establish the rule that before a court will order a defendant banished on the ground that he gained his admission by fraud, the facts relied on to establish the fraud must be made clearly to appear in the evidence. Mere suspicion or conjecture do not suffice. And fraud cannot be inferred from slight discrepancies.

Go Lun v. Nagle, 22 (2nd) Fed., p. 246

Dong Ming v. Nagle, 20 (2nd) Fed., p. 388

Chan Sing v. Nagle, 22 (2nd) Fed., p. 673.

The arrest of defendant in 1927 was unlawful, his imprisonment was unlawful, and the statement made by him while thus under unlawful restraint was improperly admitted, over his objection.

Charley Hee, 19 (2nd) Fed., p. 335.

The admission of this statement was over defendant's objection and exception. (Record p. 24.)

CONCLUSION.

We submit, that after a certificate is issued the burden of attack is on the government to show fraud if it wishes to deprive the holder of its benefits, and fraud is never presumed. On the contrary the presumption is that the officers who admitted defendant in 1922 were conscientious and performed their duty honestly and properly, and as there is not the slightest evidence that they did otherwise or that

defendant has been guilty of fraud or any wrong doing in connection with his admission, we submit the court should follow its decision in the *Ching Hong Yuk* case and order the defendant discharged.

Respectfully submitted,

LESLIE P. SCOTT and
WILMER H. EBERLY,
Attorneys for Appellant.

